Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 2001

PETER PAUL MITRANO,

Petitioner,

versus

VIRGINIA LEE KELLY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

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65pp

Question Presented for Review

1. Should the State of Vermont be required to enforce a child custody order (from the Commonwealth of Virginia dated 1992) pursuant to Title 28, United States Code, Section 1738A?

2. Should the Supreme Court of the State of Vermont be allowed to access attorney's fees related to the trial court against the petitioner for a reason raised for the first time before the Supreme Court of the State of Vermont in view of the common law American rule that each party shall pay their own attorney's fees?

3. Should the Supreme Court of the State of Vermont have ruled on the Motion to Strike filed by the petitioner?

Parties to the Proceeding

The caption of this case in this Supreme Court of the United States contains the names of all parties before the Supreme Court of the State of Vermont. Neither party is a parent, subsidiary or affiliate of any company.

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Supreme Court of the United States

October Term, 2001

PETER PAUL MITRANO,
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versus

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

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Opinion Below

The decision of the Supreme Court of the State of Vermont from which petitioner seeks certiorari appears in the Appendix hereto at page A-1. The Judgment Order of the trial court, the Vermont Family Court, Windsor County, also appears in the Appendix hereto at page A-12.

Jurisdiction

The decision of the Supreme Court of the State of Vermont was entered on August 29, 2001. This petition for writ of certiorari was filed within ninety days of said date of August 29, 2001. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(a).

Statement of the Case

This petition for writ of certiorari arises from the filing on January 9, 2001 of an Emergency Petition for Enforcement of a Custody Order that was filed by the petitioner, Peter Paul Mitrano (hereinafter sometimes referred to as the "father"). The action was dismissed by the trial court for failing to state a claim on the basis of a 12(b)(6) ruling. The Supreme Court of the State of Vermont affirmed said dismissal. The father claims that he is entitled to the custody of the parties' minor children pursuant to the custody order (from the Commonwealth of Virginia dated 1992) pursuant to Title 28, United States Code, Section 1738A. The respondent, Virginia Lee Kelly (hereinafter sometimes referred to as the "mother") claims that she is entitled to the custody of the parties' minor children despite said custody order.

The mother has denied the father access to even see his three children since January 5, 2001. The relevant facts are that the Commonwealth of Virginia entered a fully-litigated custody order stating "that the minor children of the parties shall reside primarily with" the father in compliance with Title 28, United States Code, Section 1738A on September 4, 1992. Between September 4, 1992 and October 1, 2000, there has not been any litigation between the mother and the father over the custody of said minor children. Since at least September 4, 1992 until at least October 1, 2000, the minor children of the parties have resided primarily with the father.

Beginning since at least October 6, 2000, the children have lived with their mother in the State of Vermont from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000. Accordingly, when the mother filed a petition to modify a custody order in the State of New Hampshire on October 16, 2000 (and prior thereto), the children were living in both the State of Vermont and the State of New Hampshire.

The custody Order of the Circuit Court of Fairfax County, Virginia states in part that the parties "shall have joint physical and legal custody of their minor children". Thus, while the mother was exercising her joint physical and legal custody of their minor children and living in the State of Vermont, said minor children were living in the State of Vermont. Because the mother was living with the three children of the parties in the State of Vermont in October 2000 prior to the filing by the mother of her Ex Parte Petition to Bring Cause Forward and Modify on October 16, 2000, the State of New Hampshire was not a "home State" as defined by Title 28 of the United States Code, Section 1738A(b)(4) on October 16, 2000. Accordingly, it is clear that the State of New Hampshire was not a "home State" of the children "on the date of the commencement of the proceeding". *Also see* Title 28 of the United States Code, Section 1738A(c)(2)(A)(i). Title 28 of the United States Code, Section 1738A(c)(2)(A) states that:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;"

The father left the State of New Hampshire by the end of day of December 20, 2000. There was no contestant[1] living in the State of New Hampshire at the end of day of December 20, 2000. Their daughter, Christina, had been unlawfully living with her mother in the State of Vermont. Their sons, Peter and Christopher, were living in the Commonwealth of Virginia with their father until the mother unlawfully took said boys from the Commonwealth of Virginia to the State of Vermont under her right of visitation and failed to return said boys according to the custody Order of the Circuit Court of Fairfax County, Virginia. Accordingly, after December 20, 2000, the State of New Hampshire no longer could even be considered a "home State" to pursuant Title 28 of the United States Code, Section 1738A(c)(2)(A)(ii) because no one was left in the State of New Hampshire.

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1. A "contestant" is defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child".

Any orders issued by the State of New Hampshire after December 20, 2000 are clearly void for lack of subject matter jurisdiction. Title 28 of the United States Code, Section 1738A(c)(2)(A)(ii) requires that **"a contestant continues to live in such State"**. It is clear that no contestant continued to live in the State of New Hampshire after December 20, 2000 until at least the end of January 2001.

In paragraph numbered 2 of the Emergency Petition for Enforcement of the Attached Custody Order, the father stated in part that:[2]

> ". . . The respondent, Virginia Lee Kelly, resides at Newton Lane, Norwich, Vermont 05055. The respondent, Virginia Lee Kelly, receives mail at the address of Post Office Box 1248, Norwich, Vermont 05055."

In her Motion to Dismiss and for Attorney's Fees, the mother did not deny the above-quoted language.

In paragraph numbered 6 of the Emergency Petition for Enforcement of the Attached Custody Order, the father stated that:

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2. The father contends that all facts stated in his Emergency Petition for Enforcement of the Attached Custody Order are deemed true for the purpose of deciding whether the motion to dismiss should have granted; even so, as a protective measure and out of an abundance of caution, the father notes that these facts were not contested by the mother.

> ". . . Since October 6, 2000, the children have lived with the respondent in the State of Vermont from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000. Accordingly, prior to the date of a filing of petition to modify a custody order in the State of New Hampshire which was October 16, 2000 and on October 16, 2000, the children were living in both the State of Vermont and the State of New Hampshire . . . ."

In her Motion to Dismiss and for Attorney's Fees filed before the trial court, the mother did not deny the above-quoted language.

Moreover, some of the more critical facts stated by the father in his Emergency Petition for Enforcement of the Attached Custody Order that are deemed to be true are as follows:

> "5. . . . After the petitioner produced Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) for visitation in Fairfax, Virginia, the respondent failed to return the children to petitioner in accordance with the attached custody Order of

the Circuit Court of Fairfax County, Virginia . . .

"6. **The petitioner denies that the State of New Hampshire has jurisdiction to determine custody of said children pursuant to Title 28 of the United States Code, Section 1738A.** Petitioner further states that as of the end of the day of December 20, 2000, neither the petitioner, respondent nor any of the parties' children have lived in the State of New Hampshire . . . The petitioner has been a resident of the Commonwealth of Virginia since December 21, 2000. Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) have been residents of the Commonwealth of Virginia since December 21, 2000 until they were taken away today, January 8, 2001, by the respondent. Accordingly, because there is and has been no contestant nor child living in the State of New Hampshire since the end of the day of December 20, 2000, the State of New Hampshire does not have jurisdiction to even consider making a modification of the existing custody Order of the Circuit Court of Fairfax County, Virginia for said children pursuant to Title 28 of the United States Code, Section 1738A . . . *Arguendo*, even if the State of New Hampshire were to have jurisdiction to modify the attached permanent

> custody Order of the Circuit Court of Fairfax County, Virginia, any orders from the State of New Hampshire that are ex parte orders wherein no notice whatsoever was given to petitioner (including petitioner's attorney located in the State of New Hampshire) nor where no opportunity to be heard was given petitioner are unenforceable outside the State of New Hampshire pursuant to Title 28 of the United States Code, Section 1738A." (Bold emphasis added.)

The above clearly establishes that the father has stated a cause of action because (1) there exists the valid custody order (from the Commonwealth of Virginia dated 1992); (2) Title 28 of the United States Code, Section 1738A provides that the trial court was required to enforce said valid custody order from the Commonwealth of Virginia; and (3) the mother and children were located in the State of Vermont at time the father's petition was filed.

Procedurally, on January 9, 2001, the Emergency Petition for Enforcement of a Custody Order was filed at the trial court. (A-18) The trial dismissed the said Emergency Petition for Enforcement of a Custody Order on January 23, 2001. (A-10) Thereafter, the petitioner timely filed a notice of appeal on February 12, 2001. The Entry Order of the Supreme Court of the State of Vermont was entered on August 29, 2001. (A-1) This petition for writ of certiorari was filed within ninety days of said date of August 29, 2001.

Argument

1. Should the State of Vermont be required to enforce a child custody order (from the Commonwealth of Virginia dated 1992) pursuant to Title 28, United States Code, Section 1738A?

In summary, the important points in this case are that (1) the Commonwealth of Virginia issued a custody order in compliance with Title 28, United States Code, Section 1738A on September 4, 1992; (2) on January 9, 2001, the father filed in the State of Vermont an enforcement action of said custody order from the Commonwealth of Virginia; (3) Title 28, United States Code, Section 1738A states that the trial court in the State of Vermont **"shall enforce"** said custody order from the Commonwealth of Virginia; (4) any orders from the State of New Hampshire are void and in violation of the federal law (Title 28, United States Code, Section 1738A) in that the State of New Hampshire orders were issued ex parte and/or without subject matter jurisdiction.

The Supreme Court of the State of Vermont committed error in its decision that the father failed to state a claim upon which relief may be granted. The Supreme Court of the State of Vermont relied upon allegations outside of the four corners of the Emergency Petition for Enforcement of a Custody Order. The standard of review is *de novo*.

Title 28, United States Code, Section 1738A does not require the State of Vermont to be a

"home State" to enforce the custody order from the Commonwealth of Virginia. In fact, the words **"shall enforce"** are mandatory words as opposed to "may-like" permissive language.

Title 28, United States Code, Section 1738A states in pertinent part that:

> "(a) **The appropriate authorities of every State shall enforce according to its terms**, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." (Bold emphasis added.)

Pursuant to said above-quoted language of Title 28, United States Code, Section 1738A, the father is respectfully requesting that this Court remand this matter to the Supreme Court of the State of Vermont with instructions to remand this matter to the trial court for a decision on the merits with instructions to enforce the custody order of the Circuit Court of Fairfax County, Virginia attached to the father's emergency petition for enforcement. The petitioner contends that the standard of review is *de novo*.

There is no dispute by and through the custody order of the Circuit Court of Fairfax County, Virginia, that the Commonwealth of Virginia "made a child custody or visitation determination" consistent "with the provisions of" Title 28 of the United States Code, Section 1738A.

Section 20-108 of the Code of Virginia provides that the Commonwealth of Virginia shall continue to have jurisdiction over the custody order of the Circuit Court of Fairfax County, Virginia. The father currently is a resident of the Commonwealth of Virginia. The children's paternal grandparents, who are contestants, have been residents of the Commonwealth of Virginia since 1972. The Commonwealth of Virginia has continuing jurisdiction pursuant to Title 28 of the United States Code, Sections 1738A(c)(2)(E) and 1738A(d). Title 28 of the United States Code, Section 1738A(d) states that:

> "(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant."

In *Thompson v. Thompson*, 484 U.S. 174 (1988) this Court ruled that Title 28 of the United States Code, Sections 1738A is only a full faith and credit statute and does not create a federal right of action.

Also see Meade v. Meade, 650 F.Supp. 205, 210 (N.C. 1986), *affirmed* 812 F.2d 1473 (4th Cir. 1987), which was decided prior to *Thompson v. Thompson, supra* wherein the court stated in part that:

". . . Thus North Carolina is under a federal duty to enforce the decree according to its terms and acted improperly in modifying Virginia's initial decree.

"In further support of the conclusion that North Carolina lacks modification jurisdiction under the PKPA, the court holds that Virginia's September 3, 1985, decree modifying its initial award is consistent with Section 1738A and that order is entitled to enforcement by North Carolina as required by 28 U.S.C. § 1738A(a). Virginia, as the court granting the initial decree, has continuing jurisdiction under subsection (d) of the PKPA. See 28 U.S.C. § 1738A(c)(2)(E). The so-called continuing jurisdiction provision provides as follows:

> The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

> 28 U.S.C. § 1738A(d). This provision imposes three requirements for the existence of continuing jurisdiction in Virginia: (1) a valid initial custody decree; (2) the present existence of jurisdiction under the laws of Virginia; and (3) **the current residence of one of the contestants or the child in Virginia**. Cf. DiRuggiero v. Rodgers, 743 F.2d 1009, 1016 (3d Cir.1984) . . . ." (Bold emphasis added.)

The Commonwealth of Virginia clearly had jurisdiction pursuant to Title 28, United States Code, Section 1738A at the time the custody order that is attached to the father's emergency petition for enforcement was issued. The father therefore contends that the Commonwealth of Virginia had and has continuing jurisdiction based upon the father's residence in the Commonwealth of Virginia and/or the paternal grandparents' residence in the Commonwealth of Virginia. See the discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 342 (1998), wherein it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act "that a remaining grandparent . . . should not suffice to confer exclusive, continuing jurisdiction". Contrary to said Uniform Child-Custody Jurisdiction and Enforcement Act, Title 28, United States Code, Section 1738A clearly

provides that a remaining grandparent does in fact suffice to confer exclusive, continuing jurisdiction.

Arguendo, the State of Vermont is not even required to be a "home State" to only enforce an existing custody order that issued in accordance with the requirements of Title 28, United States Code, Section 1738A. *See Dyer v. Surratt*, 466 S.E.2d 584, 587 (Ga. 1996) ("judgment that has not been modified by a court of another State with jurisdiction to do so may hear a Georgia-resident").

Moreover, the State of New Hampshire was not a "home State" on the dates that the mother filed the petitions to modify the custody order from the Commonwealth of Virginia because the children had been living in the State of Vermont part of the time with the mother prior to the filing of the petitions. In *Neger v. Neger*, 459 A.2d 628, 637-638 (N.J. 1983), the court stated:

> "As noted previously, the plaintiff and defendant had arranged for alternating physical custody of Carly . . . This record does not satisfy the statutory six-consecutive-month requirement. Carly had not lived with her father in California for six consecutive months 'within six months before commencement of the proceeding' involving custody in the California court . . . A contention that Carly's absence from New Jersey was temporary and therefore should not be counted as part of a six-month

> period assumes that residing with her father was only a visit. **However, the arrangement here was not truly characteristic of a visit, but consisted of fixed substantial periods of time in a regular alternating manner unrelated to holidays or vacations. It is possible, of course, that there may be no home state.** *See, e.g., In re the Marriage of Hubbard*, 315 N.W.2d 75 (Iowa 1982) (after Iowa divorce in 1976 in which mother was awarded custody of three children, mother and children moved so frequently before custody modification instituted in Iowa in 1979, that there was no 'home state')." (Bold emphasis added.)

Also see Johnson v. Johnson, 26 Va. App. 135, 149, 493 S.E.2d 668, 675 (1997), wherein this Court stated:

> "In the instant case, during the time immediately preceding both the divorce decree and the consent decree of December 1993, the child spent short periods alternatively with each parent, resulting in an equal division of her time between Virginia and New York. **At that time, the child had no single home state under the UCCJA definition** . . . ." (Bold emphasis added.)

In *St. Andrie v. St. Andrie*, 473 So.2d 140, 144 (La. 1985), the court also found that the child had no home state when the child lived in two different states pursuant to the agreement of the parents, the court explained the situation and stated:

> "Analyzing the situation before the court under the 'home state' standard, during the six-month period prior to the institution of the custody proceeding . . . the child was in fact shuttled back and forth between Georgia and Louisiana every few months. Therefore, **it is clear that the child has no 'home state'**." (Bold emphasis added.)

Also see 45 Hastings L.J. 1329, 1344 (July 1994) wherein it is noted that "A child in a joint custody situation might have two established homes."

The court ruled in *State Ex Rel. Conforti v. Wilson*, 203 W.Va. 21, 25, 506 S.E.2d 58, 62 (1998) that "[n]aturally, **as a federal jurisdictional statute**, the PKPA preempts the UCCJA by virtue of the Supremacy Clause. (Citation omitted)" (Bold emphasis added.) *Also see Shute v. Shute*, 158 Vt. 242, 247, 607 A.2d 890, 893 (1992), wherein the court ruled that the PKPA preempts the UCCJA and/or the state statutes whenever there is a conflict between the same as to which state has subject matter jurisdiction concerning child custody.

Because the State of New Hampshire was not a "home State" on the dates the petitions were

filed by the mother, the interpretation of the following language contained in Title 28 of the United States Code, Section 1738A(c)(2)(A) is critical:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, **or** (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, **and a contestant continues to live in such State;**" (Bold emphasis added.)

Note that in interpreting the language **"and a contestant continues to live in such State"**, this Court must also consider the statute as a whole. Note that the language is different than the words "on the date of the commencement of the proceeding" that are in the beginning of above-quoted language of Title 28 of the United States Code, Section 1738A(c)(2)(A). Also note the difference in words contained in Title 28 of the United States Code, Section 1738A(d) that "such State remains the residence of the child or of any contestant". Thus in interpreting the language **"and a contestant continues to live in such State"**, this Court should find that the plain language of said words means that the State of New Hampshire no longer had jurisdiction when all the contestants stopped living in the State of

New Hampshire. In the *Matter of Guardianship of Walling*, 727 P.2d 586, 590 (Okl. 1986), the court discussed the language stated above and stated:

> "Paragraph 1.a also does not apply because the children were not in the state at the time the commencement of the proceeding. Furthermore, paragraph 1.b is not applicable **because of the requirement of having a 'person acting as parent' continued to live in the state** . . . ." (Bold emphasis added.)

Note that in discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 343 (1998), it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act that:

> "If State A had jurisdiction under this Section [UCCJEA] at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding . . . ."

In comparison, the language of Title 28 of the United States Code, Section 1738A provides that jurisdiction is lost by all parties moving out of the state prior to the conclusion of the proceedings under Title 28 of the United States Code, Section 1738A(c)(2)(A)(ii).

Accordingly, any orders issued by the State of New Hampshire after December 20, 2000 would be void for lack of subject matter jurisdiction pursuant to Title 28 of the United States Code, Section 1738A. *Also see Badwell v. Brooks*, 686 A.2d 1179, 1182 (N.H. 1996) ("court's jurisdiction to award custody is purely statutory").

Note also that Title 28 of the United States Code, Section 1738A(c)(2)(B) does not apply because the Commonwealth of Virginia had prior jurisdiction under Title 28 of the United States Code, Section 1738A(c)(2)(A). *Also see* 32 Family Law Quarterly 267, 278 (1998), wherein it is stated:

> "In contrast, the PKPA seeks to limit the exercise of **initial custody jurisdiction** to the home state, if there is one. It does this **by prioritizing home state jurisdiction over significant connection jurisdiction**. [Footnote: 28 U.S.C. § 1738A(c)(2)(A) and (B).]" (Bold emphasis added.)

In *Harris v. Simmons*, 676 A.2d 944, 949-950 (Md. 1996), reconsideration denied, certiorari denied 684 A.2d 454, the court stated:

> "The UCCJA must be read in conjunction with the federal Parental Kidnapping Prevention Act ('PKPA'). [Footnote omitted.] **This Court has held that when a child has a home**

> **state, the PKPA 'forbids the use of significant connections as the basis for jurisdiction in child custody litigation.'** (Citations omitted.)" (Bold emphasis added.)

Also note that in the case of *In re Marriage of Leyda*, 398 N.W.2d 815, 819 (Iowa 1987), the court stated:

> ". . . The provisions of this federal legislation indicate a congressional intent that the act be applied in all interstate custody disputes. State courts considering the question have held the federal legislation preempts state law in determining when jurisdiction may be exercised in interstate custody matters. (Citations omitted.) **The federal statute uses language more specific than the UCCJA in limiting modification jurisdiction** . . . ." (Bold emphasis added.)

Another case discussing this issue is *Clarke v. Clarke*, 496 A.2d 361, 363 (N.H. 1985), wherein the court stated:

> "Critical to our analysis of the issue of jurisdiction presented here is the recognition that this case involves modification of an existing custody order and not formulation of an initial decree. (Citations omitted.) Under the Uniform Child Custody

> Jurisdiction Act (UCCJA), which New Hampshire adopted in 1979 as RSA chapter 458-A, initial jurisdiction and modification jurisdiction are governed by different standards. 'Initial jurisdiction is primarily in the home state of the child,' while '[j]urisdiction to modify an existing custody decree is reserved for the state that rendered the decree.' (Citations omitted.)"

The interpretation of Title 28 of the United States Code, Section 1738A is a question of law.

Furthermore, in *Rocissono v. Spykes*, Vt. , 749 A.2d 592, 599 (2000), the court stated that there was "case law precluding courts from bootstrapping emergency jurisdiction into jurisdiction to make permanent custody determinations. (Citation omitted.)"

The State of New Hampshire clearly did not have subject matter jurisdiction to modify the custody order from the Commonwealth of Virginia. In *Via v. Johnston*, 521 So.2d 1324, 1326 (Ala. 1987), the court stated:

> ". . . However, we have held in *Mitchell, supra*, that the PKPA does not recognize an emergency as granting modification authority; rather, it expressly states that a sister state's judgment can only be modified as is provided in § 1738A(f), *supra*. *Mitchell*, however, goes on to say that neither the best interest rule nor the emergency rules as to custody were abolished by the PKPA.

> Congress, however, established the proper forum for the determination of such issues in modification proceedings . . . ."

The language of Title 28, United States Code, Section 1738A provides clearly that under the facts of this case that the trial court must enforce the custody order from the Commonwealth of Virginia. In *Eichelberger v. Eichelberger*, 2 Va.App. 409, 412, 345 S.E.2d 10, 12 (1986), this Court ruled:

> "Once a court has ruled on matters relating to the custody and care of minor children, and visitation rights of the noncustodial parent, the court retains jurisdiction throughout the minority status of the child involved. Andrews v. Geyer, 200 Va. 107, 104 S.E.2d 747, 751 (1958) . . . ."

It is important to note that the mother has wrongfully failed to return the two boys to the father after her scheduled visitation ended on Monday, January 8, 2001. The father has not seen any of his three children since January 5, 2001. As the court stated in *Johnson v. Johnson*, 26 Va. App. 135, 146, 149, 493 S.E.2d 668, 673, 674 (1997):

> "A party must obey an existing custody order until a modification order supersedes it. '[T]he custody decree is conclusive as to all issues of

> law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law.' Code § 20-135.
>
> . . .
>
> ". . . Here mother violated a custody agreement by wrongfully retaining her child after her period of physical custody concluded. In both cases, **the violating parent gained a 'tactical advantage by his conduct.'"** (Citation omitted.) (Bold emphasis added.)

Arguendo, even if New Hampshire had jurisdiction under Title 28 of the United States Code, Section 1738A (which the father steadfastly denies), the ex parte New Hampshire order dated January 3, 2001 that dealt with the other children of the parties would be void because no notice whatsoever was given as required under Title 28 of the United States Code, Section 1738A. Title 28 of the United States Code, Section 1738A(e) states:

> "(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any

> person who has physical custody of a child."

In addition, there was no contact made by the State of New Hampshire to the Commonwealth of Virginia prior to the entry of any orders that the State of New Hampshire has made to date. *See Ex Parte Raywood*, 549 So.2d 103, 104 (Ala. 1989) wherein the court stated: "we find that the Louisiana ex parte order was not made consistently with the PKPA and is not entitled to full faith and credit by the courts of Alabama"; also *see Joel M. v. Karen M.*, 507 N.Y.S.2d 369, 371 (1986) wherein the court stated:

> "The sole issue presented in this enforcement proceeding is whether or not the Superior Court of the State of New Hampshire in making the ex parte temporary order of custody was exercising jurisdiction substantially in conformity with the PKPA and UCCJA. Because neither the respondent-mother nor the respondent-maternal grandmother who has physical custody of the children were afforded any notice whatsoever--much less an opportunity to be heard, this Court holds and determines that the New Hampshire ex parte order dated October 2, 1986 is not entitled to full faith and credit under the PKPA or the UCCJA. (See *Sherry Ann F. v. Bennet S.*, 131 Misc.2d 854, 502

N.Y.S.2d 383 (Fam.Ct., Scho.Co., 1986))."

Accordingly, because it is clear that the ex parte New Hampshire order dated January 3, 2001 is not entitled to full faith and credit under Title 28 of the United States Code, Section 1738A (even if New Hampshire had jurisdiction under Title 28 of the United States Code, Section 1738A which the father steadfastly denies), the mother wrongfully failed to return the two boys after her scheduled visitation to the father on Monday, January 8, 2001.

Immediately thereafter, on January 9, 2001, the father filed his Emergency Petition for Enforcement of a Custody Order before the trial court. Because the ex parte New Hampshire order dated January 3, 2001 is not entitled to full faith and credit under Title 28 of the United States Code, Section 1738A, the trial court erred in ruling that said New Hampshire order dated January 3, 2001 should be followed. It is clear that the federal law applies in this matter.

In this action, the father is only attempting to enforce the custody order and not modify or change the terms of the custody order that is attached to the father's emergency petition for enforcement of the subject custody order. Moreover, it is not necessary for the State of Vermont to be a "home State" to enforce the custody order that is attached to the father's emergency petition for enforcement of the subject custody order. Therefore, any assertions that the trial court and/or any other court may not proceed with an enforcement action (as opposed

to a "proceeding for a custody or visitation determination") are clearly without merit. *See* Title 28, United States Code, Section 1738A.

Note that in *Mebert v. Mebert*, 444 N.Y.S.2d 834, 837 (1981), the court emphasized that the jurisdictional requirements must be met:

> "It is true that even though the Supreme Court had both the personal jurisdiction necessary to enter a decree of divorce, it may have lacked the subject matter jurisdiction necessary to make a custody determination. (Citation omitted.)
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> . . .
>
> ". . . From its plain meaning of the statute (Citations omitted) **this court must conclude that under the federal law the best interest of the child can not be looked at in a custody matter unless the jurisdictional prerequisites set forth in the federal statute are met**, including the requirement that the child 'immediately preceding the time involved' must have lived in this state with one of its parents for at least six consecutive months. (Citation omitted.) (Bold emphasis added.)

Another reason not to recognize the New Hampshire orders are that said orders are the result of sham proceedings in that the very least

there is a willful failure of the Lebanon Family Division to follow the controlling law.[3] The Lebanon Family Division in the State of New Hampshire refuses to recognize the father's right to basic due process under the constitutions of the United States of America and the State of New Hampshire. The state court in New Hampshire is the legal equivalent of a bottomless black hell hole wherein said court has (1) taken away petitioner's children all initially on an ex parte basis; (2) unlawfully held the petitioner in contempt of court; (3) refused to allow the petitioner to call any witnesses to the stand at an alleged hearing in April 2001; (4) refused to allow the petitioner to conduct any cross-examination

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3. The father appropriately disciplined his daughter for being disrespectful by spanking her on her bottom with his hand. The father has done nothing wrong and is being denied his lawful right to custody; said spanking is being used as a pretext to deny the father his lawful custody of his children. Also note that although the father moved to the Commonwealth of Virginia and the Lebanon Family Division Court in the State of New Hampshire ruled that the father is in contempt of court for moving; the father was not required to give notice and was not required to obtain the consent of the mother prior to moving to the State that issued the initial custody order. Moreover, the custody order of the Circuit Court of Fairfax County, Virginia attached to the father's emergency petition for enforcement of the subject custody order filed before the trial court, states that the "minor children of the parties shall reside primarily with Peter". The petitioner, Peter Paul Mitrano, has a constitutional right and freedom to travel; he and his children are not wards of the State of New Hampshire.

at an alleged hearing in April 2001; and, (5) refused to issue a decision while ordering that the petitioner is not allowed any visitation whatsoever with his children. Moreover, despite the petitioner's request for aid from the Supreme Court of the State of New Hampshire, the Supreme Court of the State of New Hampshire refused to provide any assistance

The courts in the State of Vermont clearly committed error in refusing to enforce the subject custody order; clearly, the State of Vermont had and has jurisdiction to make a ruling as to whether or not to enforce the subject custody order when all the parties were physically present in the State of Vermont. The father has clearly been denied his lawful custody of his children even though the father has done nothing wrong. The father is not a "potted plant" who is required to sit in the State of New Hampshire while the State of New Hampshire violates the federal laws of the United States of America along with the father's rights and liberties. The father has not been permitted to even see his children since January 5, 2001.

In closing, the father respectfully reminds this Court that the father has rights to raise his children free of unreasonable interference. In *Collins v. Collins*, 183 Va. 408, 412-413, 32 S.E.2d 657, 658 (1945), the court stated:

> "In Surber v. Bridges, 159 Va. 329, 334, 165 S.E. 508, 509, a case involving the custody of infant children, we said: 'In cases of this kind we have said that the welfare of

> the child is the paramount consideration. * * * This statement, so often made, is not unqualifiedly true. **Parents, too, have rights which must be safeguarded."** (Bold emphasis added.)

2. Should the Supreme Court of the State of Vermont be allowed to access attorney's fees related to the trial court against the petitioner for a reason raised for the first time before the Supreme Court of the State of Vermont in view of the common law American rule that each party shall pay their own attorney's fees?

The mother has failed to state why the trial court committed error in its decision denying her attorney's fees. The mother argued for the first time on appeal before the Supreme Court of the State of Vermont that the mother was entitled to attorney's fees on the basis of the principles expounded by Robin Hood (rob from the rich and give to the poor). These were new arguments being raised on appeal for the first time and hence should not even have been considered. The mother's newly-raised-on-appeal-for-the-first-time-Robin-Hood-mentality argument that the father should pay the mother's legal fees is frivolous.

3. Should the Supreme Court of the State of Vermont have ruled on the Motion to Strike filed by the petitioner?

The Supreme Court of the State of Vermont refused to make a ruling on the Motion to Strike filed by the petitioner. The petitioner contends that Supreme Court of the State of Vermont should have ruled on said Motion to Strike especially because the ruling by the Supreme Court of the State of Vermont relies upon facts not stated in his Emergency Petition for Enforcement of a Custody Order.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Vermont.

Respectfully submitted,

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Petitioner

Dated: November 2001.

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4. The petitioner, Peter Paul Mitrano, is a member of the Bar of this Court and other courts.